

SOUTH AFRICA / JUDGMENT

DF Dynamic Freight (Pty) Ltd and Others v Two Six Nine Sydney Road Share Block (Pty) Ltd (D259/2021) [2024] ZAKZDHC 95 (17 October 2024)

[2024] ZAKZDHC 95

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Gwagwa AJ

CASE / FILE NUMBER

D259/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NAT

AL LOCAL DIVISION, DURBAN

CASE

NO: D259/2021

In

the matter between: DF
DYNAMIC FREIGHT (PTY) LTD
FIRST
APPLICANT
JAYSON
PERUMAL
SECOND
APPLICANT
THILOSHE
PERUMAL
THIRD
APPLICANT
REVIE
NANASIVANAN
FOURTH
APPLICANT
RENUKA
DEVI NANASIVANAN
FIFTH
APPLICANT
And
TWO
SIX NINE SYDNEY ROAD SHARE BLOCK (PTY) LTD
RESPONDENT
ORDER
The

following order is granted: The application for
rescission of judgment is dismissed with costs on scale C.

JUDGMENT

GWAGWA AJ

Introduction

- [1] The first applicant is a private company which is duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situated at 2[...] S[...] Road, Durban kwazulu natal.
- [2] The second to fifth applicants are directors of the first applicant also situated at 2[...] S[...] Road, Durban, kwazulu.
- [3] The respondent is Two Six Nine Sydney Road Share Block (Pty) Ltd, a private company which is duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situated at 1[...], 6[...] M[...] Drive, Mount Edgecombe kwazulu- natal.

- [4] On 14 January 2021, summons were issued and subsequently served upon the applicants.
- [5] The particulars of claim, consists of claim 1 which is related to non-compliance with a lease agreement, charges for electricity used during such lease agreement. Claim 2 emanates from an oral agreement of sale of various motor vehicles. All such claims clearly appear in the combined summons and particulars of claim of the plaintiff in the main action.
- [6] The index to rule 37 conference and trial readiness was done on the 24 October 2022.
- [7] The notice of set down for trial was served on 15 November 2022 by the plaintiff's attorneys Shepstone and Wylie, upon the defendant's attorneys Raneshan Naidoo and Associates. The case, was set down for trial, from 5-7 June 2023, All applicants failed to appear in court on the 5 June 2023, including their legal representatives ,subsequently a default judgment was granted as a result of the applicant's failure to appear in Court. All applicants applied for rescission of Judgement .
- [8] The application for rescission of judgment was opposed by the respondent. The application was heard before this court on 2 August 2024 on the opposed roll.

Nature of the case

- [9] The applicants seeks to rescind the entire judgment that was granted against the applicants' on 5 June 2023 in Durban by the Honorable Deputy Judge President Madondo. The applicants seeks a further order to pursue their defences in the main action including their counterclaim.
- [10] The aforesaid judgment was granted by default as the applicants including their legal representatives failed to appear in court on 5 June 2023 to attend trial.
- [11] The default judgment was granted as follows:

'Claim 1

1. Payment of the sum of R1 624 348.91.
2. Interest thereon at a rate of 7% per annum from the date of service of the summons to date of payment.
3. Payment of the sum of R1 308 059.25.
4. Interest thereon at the rate of 7% per annum from the date of service of the summons to date of payment.

Claim 2

1. Payment of the sum of R1 430 000.00.
3. Costs of suit on the attorney and client scale.
4. The defendant's counterclaim is hereby dismissed with costs.'

Issue to be decided

[12] The issue to be decided by the court is whether the applicants have shown good cause for an application for rescission of judgment to be granted in their favor.

Case law

[13] The court will now deal with case law which is relevant to the rescission of judgment. Furthermore, the court will also deal with the non-appearance of the applicants and their legal representative in court on 5 June 2023.

[14] In *Matseke v Maine*[1] it was held that:[2]

'A party seeking rescission of judgment in terms of the common law, bears the onus to show good cause. This essentially entails prove of two requirements which are (1) reasonable and satisfactory explanation for its default and (2) that on the merits the party has a bona fide defence which carries some prospects or probability of success.'

[15] Furthermore, in *Rossiter and Others v Nedbank Ltd*[3] the Supreme Court of Appeal held:[4]

'The law governing an application for rescission under Uniform rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted... '

[16] In *Elia and Others v Absa Bank Ltd*[5] Mahalelo J indicated that:[6]

'An element of the explanation for the default is that the applicant must show that he was not in wilful default. If the case the applicant makes out on wilful default is not persuasive, that is not the end of the enquiry

- the applicant's case may be rescued if a bona fide defence is demonstrated.' (Footnote omitted.)

[17] The application for rescission of judgment was applied for by Rashan Naidoo (Mr Naidoo), a legal representative for the fourth and fifth applicants by virtue of Power of Authority referred to herein as annexure "A" which appears on page 19 of the founding affidavit.

[18] Interestingly, paragraphs 9 and 10 of his founding affidavit states that all communication regarding the case would be emailed to the second respondent Jayson Perumal.

[19] In paragraph 11 strangely Mr Naidoo explains the mishap of mis-diarizing his diary. I will quote this paragraph, which states as follows:

'With that being the case, I for some inexplicable reason or the other erroneously entered the matter in my diary for trial between the period 6-8 June 2023.'

- [20] Counsel for the respondent Mr Oldworth then referred to annexure "RN3" of the applicants founding affidavit, where it was stated that for some inexplicable reason the 5 June 2023 was omitted. Mr Naidoo was then subsequently advised by Mr De Villiers, the legal representative of the respondent that judgment had been granted against the applicants on 5 June 2023. Mr Naidoo concedes that the blame should be solely put on his shoulders as clearly explained in paragraphs 25 and 26 of his founding affidavit.
- [21] The second defence further raised by the applicants is that the flights were booked on 24 May 2023 by the second and third applicants, the booking appears as annexure "RN41" of the applicant's founding affidavit, page 26 of the applicant's founding affidavit. The flights were booked for the purposes of attending a trial by both second and third applicants on 6 June 2023, however same were cancelled on 4 June 2023.
- [22] In contrast, the respondent vastly opposed the application for rescission of judgement. An issue raised by the Respondent, was the issue of willful default by the applicants, the reason, raised by the applicants' counsel Mr Reddy is that Mr Naidoo mis-diarized the trial dates for some inexplicable reason. It is also noted that, Mr Naidoo received the trial dates being the 5-7 June 2023. Mr Naidoo again wrote to the second applicant by email on the 22 November 2022 advising him that the case will proceed on 5-7 June 2023, therefore the correct date was conveyed to the second applicant. However, Mr Naidoo subsequently, telephoned and conveyed an incorrect date on 24 May 2023 to the second applicant that, the case will proceed on 6 June 2024, It is also interesting that the other co-applicants did not confirm by means of confirmatory affidavits to support the above version of the second applicant.
- [23] Mr Oldworth Counsel for the Respondent also raised an issue of bona fide defence, or prospect of success which was not alleged in the founding affidavit of the applicants. He argued that it is not clear from the founding affidavit as to the existence of any bona fide defense of the Applicants save to say that the applicants does have a defense thereof.
- [24] Mr De Villiers legal representative for the respondent made a further inquiry to FlySafair flights in respect of the second and third applicants regarding the cancelled flights with voucher number Z[...] which was issued and valid until 4 June 2023 both second and third applicants were due to attend Court on 5 June 2023. Mr De Villiers was aware that FlySafair had a policy that any voucher that is cancelled is redeemable for one year from the date of cancellation.[7] Indeed his inquiry confirmed that FlySafair has such policy.

Analysis

- [25] The main bone of contention is whether the applicants have shown good cause for the rescission of judgment. The legal representative for the applicants, Mr Naidoo, has put up a defence of mis-diarizing his file and thus takes the blame for such inexplicable error. Mr Naidoo does not provide any reason why he made such a grave error in his founding affidavit, save to say that he mis-diarized his file.

- [26] Mr Naidoo advised the second applicant by email of the correct date being 5-7 June 2023, however a wrong date being 6 June 2023 was conveyed telephonically to the second applicant. The issue is whether this version is reasonably probably true facts of the events as explained by the applicants' legal representative, that he misdiarized his file . If Mr Naidoo emailed the correct date to the second applicant and subsequently telephoned the second applicant and advised him about incorrect date, being the 6 June 2023 , a reasonable person in the stead of the second applicant could have enquired about such confusion by Mr Naidoo thus communicating two dates ie 5 and 6 June 2023 , but none seems to appear in his founding affidavit, if indeed there was such telephonic call by Mr Naidoo to the second applicant . It is not clearly explained why two dates were communicated to the second applicant by Mr Naidoo.
- [27] Why would Mr Naidoo who is an experienced practitioner mis-diarize his file, given the fact that he received the correct notice of set down, such version was unexplainable by Mr Naidoo.
- [28] Mr Aldworth argued that the applicants have failed to show good cause for the rescission of Judgment. It is also unexplainable why the flights for the second and third applicants were cancelled on 4 June 2023, if they knew about the correct date. Is there any good cause shown by the applicants in line with the Matseke v Maine judgment?
- [29] In my view there is no good cause shown by the applicant in his founding affidavit which can persuade this court to accede to their application for rescission of judgement. Therefore, I agree with Mr Aldworth that there is no good cause shown by the applicant for granting such application for rescission of Judgement in the applicants favor.
- [30] The error on Mr Naidoo's part in mis-diarizing the file is a mishap and a gross negligence on his part which has costed the applicants their rightful recourse to defend their case. The court could not comprehend or find any reasonable explanation in the applicant founding affidavit concerning the mis-diarizing of the file or case, together with the cancellation of the flights on 4 June 2024 by the second and third respondent respectively. There is a lacuna which cannot be explained by the applicants or Mr Naidoo.
- [31] Mr Reddy submitted that the flights were cancelled in order to allow the second and third applicants to travel by motor vehicle since the third applicant suffered injuries, did the second and third applicant drove by a motor vehicle on the 4 June 2023 to attend court , is any ones guess . However what is noticeable is that no one attended court on the 5 June 2023 , hence default Judgement

was granted against all applicants . Mr Reddy further could not address the court on the issue of prospect of success either nor was it found in the applicants' founding affidavit, save to say that the applicants sought a relief to file their counterclaim against the respondent.

[32] Mr Naidoo only justifies the cancellation of the flyghts on the 4 June 2022 by second and third applicant due to his misdiarizing his file ? why would the misdiarizing of the file lead to cancellation of the flyghts? If both second and third respondent opted to drive , did they arrive in Durban ?there is no indication if that happened , it remains a mistry . It is inexplicably missing from the applicant's founding affidavit. It is implausible to comprehend the issue of mis-diarizing of the trial date and flight cancellation by second and third applicant.

[33] The applicants have not made a case to justify or persuade the court to grant the order sought in their notice of motion.

[34] It is evidently demonstrated by Mahalelo J in Matseke v Maine where he stated that the applicant must clearly explain that there was no willful default on his part. However, on the part of the applicants, there is no justifiable cause in Mr Naidoo founding affidavit, which exonerate him from any willful default. The

reason of mis-diarizing submitted by Mr Naidoo is not convincing and not reasonably probably true facts to be accepted by this court , bearing in mind that the notice of set down was served upon applicants legal representative , which clearly stated the trial date being 5-7 June 2023. This notion of mis-diarizing of the trial date is inconceivable and a fallacy on the part of Mr Naidoo, whose is acting on behalf of the applicants.

[35] Even if the applicants managed to address the court on good cause shown (but failed to do so), the second imperative issue was whether the applicants had a bona fide defence in the main action, again there was no bona fide defence found from the applicants' founding affidavit nor did Mr Reddy address the court on this issue convincingly.

[36] Therefore, the application for rescission of the default judgment stands to be dismissed with costs.

Order

[37] I therefore make the following order:

Date of Hearing : 2 August 2024

Date of delivery : 17 October 2024

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Ref: DJDV/TWON27623.1)

[1] Matseke v Maine

[2024] ZANWHC 13.

[2] Ibid para 55.

[3] Rossiter and Others v Nedbank Ltd

[2015] ZASCA 196.

[4] Ibid para 16.

[5] Elia and Others v Absa Bank Ltd

[2023] ZAGPJHC 649.

[6] Ibid para 13.

[7] Page 3 of the index to admit affidavit.

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